IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBIN SCALISI and JOHN SCALISI	:	CIVIL ACTION
vs.	:	NO. 05-CV-3413
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER and JOHN DOE	:	

MEMORANDUM AND ORDER

JOYNER, J. **November , 2005**

Presently pending before the Court is the motion of the defendants for dismissal of the plaintiffs' complaint. Borrowing heavily from the Memorandum and Order which we issued on April 26, 2005 in the companion case of Schlichter v. Limerick Township, et. al., Civ. A. No. 04-4229, we shall grant the defendants' motion.

History of the Case

Plaintiffs in this case are Robin Scalisi, a former administrative assistant employed by Limerick Township and her husband, John Scalisi. Plaintiffs allege in their complaint that throughout the course of her employment with the township from March, 2000 until November, 2003, Mrs. Scalisi was subjected to a sexually hostile work environment created by the actions of Limerick Township Police Officer Adam Moore and Police Chief W.

Douglas Weaver and tolerated by Township Manager Walter Zaremba. Specifically, the Scalisis complain that the sexually hostile environment was created by the following incidents:

> 1. On February 14, 2003, Moore caused to be published in the Pottstown Mercury Newspaper, a Valentine's Day message which stated: "Dear Sgt., Spring is right around the corner, just like me. Look outside, see a Robin by the tree. Love Azalea." (The plaintiff resides on Azalea Court in Limerick Township.)
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> 2. On May 17, 2003, Weaver and Moore caused a hotel room key and package of condoms to be placed on Sergeant Schlichter's personal Ford 150 truck which was found by Sergeant Schlichter and his daughter.
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> 3. On May 19, 2003, ... a bumper sticker was placed by Moore and/or Weaver, on the right bumper of Schlichter's truck entitled "Ass, Gas, or Grass, Nobody Rides for Free."
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> 4. On or about July 30, 2003, Moore mailed an envelope to Mrs. Barbara Schlichter, which contained a photograph he had taken of Sergeant Schlichter's police vehicle parked outside Plaintiff's home on Azalea Court. The photograph stated in writing at the bottom "Bill lying to Barb about why he's parked in front of his girlfriend's house while on duty...PRICELESS.
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> 5. This photograph was also posted at the Limerick Township Police Department Building and viewed by numerous employees of Limerick Township.

(Complaint, ¶s18-20, 26, 31, 36-38).

Plaintiffs allege that both they and Sgt. Schlichter reported these incidents to Defendant Zaremba, who promised to look into them and take appropriate action but nevertheless did nothing. (Complaint, ¶s40-42). Mrs. Scalisi alleges that she was so severely embarrassed and humiliated by these incidents of sexual harassment that her work performance was affected and the

conditions of her employment were altered. (Complaint, ¶s21, 28, 33 39). When it became apparent to wife-plaintiff that the township tolerated and promoted sexual harassment in the workplace, she resigned her position. (Complaint, ¶46). In response to Plaintiff's formal filing of a sexual harassment complaint with the township, the township accused Plaintiff of going to the newspapers. (Complaint, ¶s 47, 52).

Plaintiff received a Notice of Right to Sue from the Equal Employment Opportunity Commission ("EEOC") on June 2, 2005 and this suit was thereafter commenced on July 1, 2005 for the defendants' alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et. seq.* and the Pennsylvania Human Relations Act, ("PHRA") 43 P.S. §951, *et. seq.*, violations of her First Amendment rights under 42 U.S.C. §1983 and under Pennsylvania common law for invasion of privacy, placing her in a false light and for John Scalisi's loss of consortium. It is these claims which Defendants now seek to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

Standards Applicable to Rule 12(b)(6) Motions

As a general rule, in considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations

omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

A. Plaintiff's Claims for Retaliation and Hostile Work Environment under Title VII and the Pennsylvania Human Relations Act.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2 provides as follows, in relevant part:

> **(a) Employer practices**
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> It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
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> ...
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> **(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices**
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> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Under 42 U.S.C. §2000e-3(a),

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Similarly, the Pennsylvania Human Relations Act, 43 P.S. §955 provides in pertinent part,

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
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> (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness, or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required. The provision of this paragraph shall not apply, to (1) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (2) operation of the terms or conditions of any bona fide group or employe (sic) insurance plan, (3) age limitations placed upon entry into bona fide apprenticeship programs of two years or more approved by the State Apprenticeship and Training Council of the Department of Labor and Industry, established by the Act of July 14, 1961...Notwithstanding any provision of this clause, it shall not be an unfair employment practice for a religious corporation or association to hire or employ on the basis of sex in those certain instances where sex is a bona fide occupational qualification because of the religious beliefs, practices, or observances of the corporation, or association.
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> ...
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> (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

> (e) For any person, employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

As employer liability under the Pennsylvania Human Relations Act follows the standards set out for employer liability under Title VII, our analysis of plaintiffs' Title VII claims applies with equal force to their PHRA claims. See, Knabe v. Boury Corp., 114 F.3d 407, 410 (3d Cir. 1997); McCutcheon v. Sunoco, Civ. A. No. 01-2788, 2002 U.S. Dist. LEXIS 15426 (E.D.Pa. Aug. 16, 2002). A plaintiff may succeed on a Title VII discrimination claim by producing direct evidence or circumstantial evidence of discrimination. Allen v. AMTRAK, 2005 U.S. Dist. LEXIS 19624, *13-*14 (E.D.Pa. Sept. 6, 2005). In the absence of direct evidence of discrimination, a plaintiff may establish discrimination through circumstantial evidence using the now well-known, three-part formula first articulated in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Id. Under this formula, the plaintiff first has the burden of proving a *prima facie* case[1] of discrimination by the preponderance of the

[1] To establish a *prima facie* case, a plaintiff must show (1) that he belongs to a protected class, (2) that he was

evidence. Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. Burdine, 450 U.S. at 254, 101 S.Ct. at 1094. The presumption then places the burden upon the defendant to produce an explanation to rebut the *prima facie* case, *i.e.*, the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993), citing Burdine, 450 U.S. at 254, 101 S.Ct. at 1094. "If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted and drops from the case" and the plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision." Id., quoting Burdine, 450 U.S. at 255, 101 S.Ct. at 1094-1095.

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate that: (1) she engaged in

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qualified for the job at issue (3) that despite his qualifications, he suffered an adverse employment decision (*i.e.,* was not hired, was terminated, not promoted, etc.) and (4) that non-members of the protected class were treated more favorably. See, McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 252-253; Delli Santi v. CNA Insurance Co., 88 F.3d 192, 198 (3d Cir. 1996); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

protected activity, (2) the defendant took an adverse employment action against her, and (3) that a causal link exists between the protected activity and the adverse action. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997); Allen v. AMTRAK, 2005 U.S. Dist. LEXIS 19624 at *30. To make out a *prima facie* case of hostile work environment, a plaintiff must show: (1) that she suffered intentional discrimination because of her membership in a protected class, (2) the discrimination was pervasive and regular, (3) the discrimination detrimentally affected her, (4) the discrimination would detrimentally affect a reasonable person of the same protected class in that position, and (5) the existence of *respondeat superior* liability. Verdin v. Weeks Marine, Inc., No. 03-4571, 2005 U.S. App. LEXIS 2649 at *7-*8 (3d Cir. Feb. 16, 2005); Shesko v. City of Coatesville, 292 F.Supp.2d 719, 725 (E.D.Pa. 2003). In determining whether an environment is sufficiently hostile or abusive, courts look to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 116-117, 122 S.Ct. 2061, 2074, 153 L.Ed.2d 106 (2002); Shesko, supra, quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787-788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

To qualify for relief under Title VII, however, the plaintiff must show that the harassing behavior was "sufficiently severe or pervasive to alter the conditions of employment," and thus a "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." Morgan, 536 U.S. at 117, 122 S.Ct. at 2073 and Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993), both quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 92 L.Ed.2d 49 (1986).

Applying these principles to the case at hand, we note that Plaintiff's hostile work environment and retaliation claims, like Sergeant Schlichter's, are premised upon the publication of a Valentine's Day message in the Pottstown Mercury newspaper, the placement of a bumper sticker, hotel key and condom on Sergeant Schlichter's personal vehicle and on the mailing and posting of the photograph of the Sergeant's truck in front of Plaintiff's home. Again, as we opined in our earlier Memorandum in the Schlichter case, while we find these incidents to be rude and inappropriate, they occurred sporadically over a more than six month period of time and we cannot find them to be so severe as to alter the terms of wife-Plaintiff's employment or to make her working conditions so intolerable that the average reasonable

person in her position would have felt forced to resign.[2] In addition, although Plaintiff's complaint contains allegations that Sgt. Schlichter was threatened with and retaliated against by the Township defendants for speaking out about the incidents which he believed had the effect of sexually harassing Plaintiff, there are no averments that the plaintiff herself was ever retaliated against for bringing the incidents at issue to the attention of Defendant Zaremba. We therefore find that the complaint here fails to plead valid hostile work environment and/or retaliation causes of action under Title VII and the PHRA and thus we shall dismiss Counts I, II and VII of the Plaintiffs' complaint.

B. Plaintiffs' Claims Under 42 U.S.C. §1983

Defendants also move for the dismissal of Plaintiffs' claims under 42 U.S.C. §1983 for the defendants' alleged deprivation of her First Amendment rights to hold employment without infringement of her rights to freedom of speech, assembly and association.

Specifically, Section 1983 provides, in relevant part:

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[2] We again note that under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004). The inquiry is an objective one–whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. Id.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

It has been noted that the purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. Wyatt v. Cole, 504 U.S. 158, 161, 112 S.Ct. 1827, 1830, 118 L.Ed.2d 504 (1992). Section 1983 is thus not itself a source of substantive rights but rather provides a cause of action for the vindication of federal rights. Rinker v. Sipler, 264 F.Supp.2d 181, 186 (M.D.Pa. 2003), citing Graham v. Connor, 490 U.S. 386, 393-394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

To make out a claim under Section 1983, a plaintiff must demonstrate that the conduct of which he is complaining has been committed under color of state or territorial law and that it operated to deny him a right or rights secured by the Constitution or laws of the United States. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980); Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir.

1998); Moore v. Tartler, 986 F.2d 682, 686 (3d Cir. 1993).

It is true that local governing bodies may be sued directly under §1983 for monetary, declaratory or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, decision, or custom whether officially adopted or informally approved through the government body's offices and/or official decision-making channels. Monell v. New York City Department of Social Services, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-2036, 56 L.Ed.2d 611 (1978). However, a municipality can not be held liable solely on the basis of its employees' or agent's actions under the doctrine of *respondeat superior*. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997); Must v. West Hills Police Department, No. 03-4491, 2005 U.S. App. LEXIS 4504 at *15 (3d Cir. March 16, 2005). Instead, the plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. Bryan County, 520 U.S. at 404, 117 S.Ct. At 1388. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a causal link between the municipal action and the deprivation of federal rights. Id. In other words, to recover against a municipality, a plaintiff must demonstrate that municipal policymakers, acting with deliberate indifference or

reckless indifference, established or maintained a policy or well-settled custom[3] which caused a municipal employee to violate plaintiffs' constitutional rights and that such policy or custom was the moving force behind the constitutional tort. Padilla v. Township of Cherry Hill, No. 03-3133, 110 Fed. Appx. 272, 278 (3d Cir. Oct. 5, 2004).

In Counts III and IV of their Complaint, plaintiffs assert that the defendants violated Mrs. Scalisi's right to hold employment without infringement of her First Amendment rights to freedom of speech, assembly and association, that Defendants intentionally, wilfully and recklessly engaged in a pattern of harassment creating a hostile work environment designed to deny Plaintiff her First Amendment rights to freedom of speech, assembly and association, and that the defendants' actions "were designed to penalize and retaliate against Plaintiff for her exercise of fundamental First Amendment rights and to prevent Plaintiff from opposing and reporting practices of sexual discrimination and retaliation policies and practices of the Township, which are a matter of public concern to the citizens of

[3] "Policy" is said to be made when a decisionmaker possessing final authority to establish municipal policy with respect to an action issues an official proclamation, policy or edict. "Customs" are practices of state officials so permanent and well-settled as to virtually constitute law. Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000), quoting Pembaur v. City of Cincinnati, 475 U.S. 468, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), Monell, 436 U.S. at 691, 98 S.Ct. 2018; Kneipp v. Tedder, 95 F.3d 1199, 1212 (3d Cir. 1996).

the Township and to the citizens of the Commonwealth of Pennsylvania." (Complaint, ¶s81-83).

It has long been held that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983), citing, *inter alia*, Branti v. Finkel, 445 U.S. 507, 515-16, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980), Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972) and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). To be protected by the First Amendment, speech by a government employee must be on a matter of public concern and the employee's interest in expressing himself on a given matter must not be outweighed by any injury the speech could cause to the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Waters v. Churchill, 511 U.S. 661, 668, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994), quoting Connick, 461 U.S. at 142 and Pickering, 391 U.S. at 568.

A balance must therefore be struck between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Connick, supra., quoting Pickering, 391

U.S. at 568, 88 S.Ct. At 1734. In performing this balancing, the manner, time, place and entire context of the expression are relevant. Swartzwelder v. McNeilly, 297 F.3d 228, 235 (3d Cir. 2002), citing Connick and Waters, both supra. Other pertinent considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Id., quoting Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). In order to show a First Amendment violation, the burden is on the public employee to show that his conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the employer's adverse employment decision. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 573, 50 L.Ed.2d 471 (1977). If the employee carries that burden, the employer must show by a preponderance of the evidence that it would have reached the same decision as to the employee even in the absence of the protected conduct. Crawford-El v. Britton, 523 U.S. 574, 592, 118 S.Ct. 1584, 1594, 140 L.Ed.2d 759 (1998); Mt. Healthy, supra. Where, however, a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most

unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a government employer's personnel decision. Swartzwelder, 297 F.3d at 235.

Likewise, a public employee has a constitutional right to speak on matters of public concern without fear of retaliation. Baldassare v. State of New Jersey, 250 F.3d 188, 194 (3d Cir. 2001). A public employee's retaliation claim for engaging in protected activity must also be evaluated under a three-step process. Green v. Philadelphia Housing Authority, 105 F.3d 882, 885 (3d Cir. 1997). First, the employee must demonstrate that the speech involves a matter of public concern and the employee's interest in the speech outweighs the government employer's countervailing interest in providing efficient and effective services to the public. Curinga v. City of Clairton, 357 F.3d 305, 310 (3d Cir. 2004) citing Pro v. Donatucci, 81 F.3d 1283, 1288 (3d Cir. 1996). See Also, Ambrose v. Township of Robinson, 303 F.3d 488, 493 (3d Cir. 2002). Next, the speech must have been a substantial or motivating factor in the alleged retaliatory action. Id., citing Baldassare, 250 F.3d at 194-195. Finally, the employer can show that it would have taken the adverse action even if the employee had not engaged in the protected conduct. Id. See Also, Ober v. Evanko, No. 02-3725, 80 Fed. Appx. 196, 199-200, 2003 U.S. App. LEXIS 23040 (3d Cir. Oct. 31, 2003); Bounds v. Taylor, No. 02-2644, 77 Fed. Appx. 99,

102, 2003 U.S. App. LEXIS 20631 (3d Cir. Sept. 18, 2003). The second and third factors are questions of fact, while the first factor is a question of law. Curinga, 357 F.3d at 310, citing Pro, 81 F.3d at 1288.

Although not entirely clear, it appears from the complaint in this case that the plaintiffs are basing their First Amendment claims upon the report which they made to Defendant Zaremba, in their "prompt personal meeting" with him at which time they "spoke out against" the sexual harassment. "A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community," such as if it attempts to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials." Baldassare, 250 F.3d at 195. Speech by public employees is not considered to be on a matter of public concern when it is "upon matters only of personal interest." Costenbader-Jacobson v. Pennsylvania Department of Revenue, 227 F.Supp.2d 304, 311 (M.D.Pa. 2002), quoting Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983). Generally, "speech disclosing public officials' misfeasance is protected while speech intended to air personal grievances is not." Id., quoting Swineford v. Snyder County, 15 F.3d 1258, 1271 (3d Cir. 1994). As the Third Circuit has found that complaints of racial and/or sexual discrimination and harassment

may constitute speech on a matter of public concern as a matter of law, where the content of the complaints, if made public, "would be relevant to the electorate's evaluation of the performance of the office of an elected official," we find that the plaintiffs here have pled sufficient facts to satisfy the "public interest" requirement for pleading a claim under the First Amendment. See, Azzaro v. County of Allegheny, 110 F.3d 968, 978 (3d Cir. 1997); Bianchi v. City of Philadelphia, 183 F.Supp.2d 726, 745 (E.D.Pa. 2002).

As in Sergeant Schlichter's case, Defendants' submit that Plaintiff's First Amendment claim fails because the second step[4] of the test cannot be satisfied by the facts as alleged here. Again, while Defendants recognize that an adverse employment action short of actual termination is potentially actionable by a public employee, they urge the court to find that the actions which they allegedly undertook against the plaintiffs here were so trivial as to not be adverse or actionable.

Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry focusing on the status of the speaker, the

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[4] This step actually contains two separable inquiries: "Did the defendants take an action adverse to the public employee and, if so, was the motivation for the action to retaliate against the employee for the protected activity." Muti v. Schmidt, No. 03-1206, 96 Fed. Appx. 69, 74, 2004 U.S. App. LEXIS 7933, *12 (3d Cir. April 21, 2004), quoting Merkle v. Upper Dublin School District, 211 F.3d 782, 800, n.3 (3d Cir. 2000).

status of the retaliator, the relationship between the speaker and the retaliator and the nature of the retaliatory acts. Brennan v. Norton, 350 F.3d 399, 419 (3d Cir. 2003), quoting Suarez Corp. v. Industries v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000). Consequently, to properly balance these interests, courts have required that the nature of the retaliatory acts committed by a public employer be more than *de minimus* or trivial. Id. The critical question is whether the retaliatory act would be likely to "deter a person of ordinary firmness" from exercising his or her First Amendment rights. Schneck v. Saucon Valley School District, 340 F.Supp.2d 558, 569 (E.D.Pa. 2004), quoting Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000). Thus, a public employer may be said to have adversely affected an employee's First Amendment rights when it refuses to rehire an employee because of the exercise of those rights or when it makes decisions which relate to promotion, transfer, recall and hiring, based on the exercise of an employee's First Amendment rights. Brennan, supra., quoting Suarez, also supra. On the other hand, courts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands. Id. See Also, McKee v. Hart, Civ. A. No. 3:CV-02-1910, 2004 U.S. Dist. LEXIS 11685 at *24 (M.D.Pa. Feb. 12, 2004); Young v. Bensalem

Township, Civ. A. No. 04-1292, 2004 U.S. Dist. LEXIS 15412 (E.D.Pa. July 23, 2004).

In reviewing the Scalisis' complaint in conjunction with the foregoing principles, we must agree with the defendants that the publication of the message in the newspaper, the placement of the condoms, note and bumper sticker upon Plaintiffs' truck and the posting of the photograph in the township building, are little more than trivial annoyances not severe enough to cause "reasonably hardy individuals to refrain from protected activity." Muti, 96 Fed. Appx. at 74. Moreover, in as much as it appears that the one and only time that either of the plaintiffs in this case "spoke out" against these alleged incidents of sexual harassment was *after* they occurred and since the defendants here are alleged to have retaliated against Sergeant Schlichter only, we can reach no other conclusion but that the plaintiffs in this case have failed to state a claim upon which relief may be granted against Defendants for unlawful retaliation against Plaintiffs for exercise of their First Amendment rights. Accordingly, the motion to dismiss is also granted as to Counts III and IV.

C. Plaintiffs' Remaining State Law Claims for Invasion of Privacy, Placing Plaintiffs in False Light and Loss of Consortium

In Counts V, VI and VIII Plaintiffs assert claims under Pennsylvania state law for invasion of privacy, false light and

loss of consortium. In light of our dismissal of all of the plaintiffs' federal law claims, we decline to exercise supplemental jurisdiction over these remaining state law claims. We shall therefore dismiss these claims as well, albeit without prejudice to the plaintiffs' right to re-file them in the Court of Common Pleas of the appropriate county should they so choose. See Generally, 28 U.S.C. §1367(c).

An order follows.

IN THE UNITED STATES DISTRICT COURT
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ROBIN SCALISI and JOHN SCALISI	:	CIVIL ACTION
vs.	:	NO. 05-CV-3413
LIMERICK TOWNSHIP, W. DOUGLAS WEAVER, OFFICER ADAM MOORE, WALTER ZAREMBA, TOWNSHIP MANAGER and JOHN DOE	:	

ORDER

AND NOW, this day of November, 2005, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED and the Plaintiffs' Complaint is DISMISSED in accordance with the rationale set forth in the preceding Memorandum Opinion.

BY THE COURT:

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J. CURTIS JOYNER, J.